

United States District Court
Central District of California

EMILY ELSON, et al.,
Plaintiff,

v.

ASHLEY BLACK, et al.,
Defendants.

Case № 2:18-CV-00116-ODW (RAOx)

**ORDER ON MOTIONS TO DISMISS
[45], [46], [47], [48], [63], and [64]**

I. INTRODUCTION

Presently before the Court are Motions to Dismiss and a Motion to Strike filed by Defendants ADB Innovations, ADB Interests, LLC, and Ashley Diana Black International Holdings (collectively “Defendants”). In the interest of judicial economy, the Court resolves only Defendants’ motions to dismiss concerning 12(b)(2) and (4)–(5). For the reasons to follow, the Court **STRIKES**¹ Defendants’ motion to

¹ The Court **STRIKES** Defendants’ motions (ECF Nos. 63–64.) because Defendants have blatantly attempted to circumvent the Court’s Order (ECF No. 43) by submitting a 35-page motion with 130 footnotes and another 32-page motion with 113 footnotes. Clearly, Defendants’ motion would have exceeded the exceptionally generous page limitation of 35 pages had Defendants included their footnotes in the body of the motions. Accordingly, Defendants’ motions are in deliberate violation of C.D. Cal. L.R. 11-6. Therefore, the motions are stricken. *See, e.g., Roberts v. Brown*,

1 dismiss (ECF No. 63) and motion to strike (ECF No. 64); **DENIES** Defendants’
 2 motion to dismiss for insufficient process and failure to timely serve (ECF No. 47);
 3 **DENIES** Defendants’ motion to dismiss for lack of personal jurisdiction (ECF
 4 No. 46); and **TRANSFERS** the matter to the Southern District of Texas to cure want
 5 of personal jurisdiction and in the interest of justice.

6 II. FACTUAL BACKGROUND

7 The instant matter is a putative class action involving the FasciaBlaster, a self-
 8 care product. According to Plaintiffs, Defendants market the product on
 9 AshleyBlackGuru.com, which contains statements indicating that use of the
 10 FasciaBlaster “lessens the look of cellulite,” “[i]mproves blood flow,” “[h]elps reduce
 11 pain,” and “accelerates muscle recovery.” (Consolidated Am. Compl. (“CAC”) ¶ 181,
 12 ECF No. 37.) Moreover, Plaintiffs maintain members of the class read the following
 13 statement prior to purchasing a FasciaBlaster online: “FasciaBlaster® is designed for
 14 self-treatment and can be used by anyone on any area of the body. With regular use of
 15 the FasciaBlaster®, one can expect pain reduction and improved flexibility, joint
 16 function, circulation, muscle definition and performance, nerve activity, posture, and
 17 enhanced beauty including the virtual elimination of CELLULITE.” (CAC ¶ 4.)

18 Defendant Ashley Black is “an individual who is the founder and principal
 19 owner of the corporate entity defendants and is the person primarily responsible for
 20 the wrongdoing alleged herein.” (CAC ¶ 168.) At the time of filing, Plaintiffs
 21 maintained Black resides in California and in the Central District. (*Id.*) Ms. Black is
 22 actively involved as the spokesperson extolling the virtues of the FasciaBlaster. (*Id.*)

23 Plaintiffs maintain that all other defendants are corporate entities owned and
 24 controlled by Ms. Black, but the precise role of each defendant in the alleged
 25 wrongdoing is unclear, and hence will be the subject of discovery. (CAC ¶ 169.)
 26
 27

28 No. 2:13-CV-07461-ODW (JCx), 2014 WL 2440008, at *1 (C.D. Cal. May 30, 2014) (noting brief
 stricken for violating Local Rule 11-6).

1 Ashley Black Company (“ABC”) is a corporation with its principal place of
2 business in Texas, and “is jointly responsible for the manufacture, marketing,
3 advertising[,] and distribution of the FasciaBlaster throughout the United States.
4 [ABC] created and/or authorized the false, misleading[,] and deceptive statements
5 about the FasciaBlaster.” (CAC ¶ 170.)

6 Defendant ADB Interests, LLC (“ADB Interests”) is a Texas company based in
7 Pearlman[sic], Texas. (CAC ¶ 171.) ADB is “identified as the owner of the Ashley
8 Black website that carries the misrepresentations.” (CAC ¶ 171.)

9 Defendant ADB Innovations, LLC (“ADB Innovations”) “identifies itself in
10 corporate literature as the source of some of the Ashley Black products and is the
11 source of one of the disclaimers about the products.” (CAC ¶ 172.)

12 Defendant Ashley Black Guru is also located in Pearland, Texas, and “identifies
13 itself as a copyright holder on certain corporate literature on the Ashley Black
14 website.” (CAC ¶ 173.)

15 Defendant Ashley Diana Black International Holdings, LLC, (“ADBIH”) is a
16 Delaware corporation, “based, on information and belief, in Pearland, Texas.”
17 ADBIH “is the holder of certain intellectual property concerning the FasciaBlaster.”
18 (CAC ¶ 174.)

19 Defendant Ashley Black Fasciology, LLC, is “another corporate entity
20 controlled by Ashley Black.” The exact role of this entity in marketing and sale of the
21 FasciaBlaster is unknown. (CAC ¶ 175.)

22 Plaintiffs filed this suit in California State Court on October 23, 2017. (Notice
23 of Removal Ex. A, ECF No. 1-3.) Defendants removed the matter on January 5, 2018.
24 Plaintiffs filed a consolidated complaint under the Class Action Fairness Act on April
25 17, 2018, alleging thirty-five causes of action, which include violations of the
26 Magnuson-Moss Warranty Act, Song-Beverly Act, California Business and
27 Professions Code, Consumer Legal Remedies Act, as well as express and implied
28 warranty violations under the laws of at least eight states. (CAC ¶¶ 249–578.) On

1 August 14, 2018, Defendants filed their Motions to Dismiss (ECF Nos. 45–48) and
 2 added another Motion to Dismiss and Strike on August 16, 2018. (ECF Nos. 63–64.)
 3 The Motions were taken under submission on December 4, 2018. (ECF No. 93.)

4 III. DISCUSSION

5 A. SUBJECT MATTER JURISDICTION

6 Federal courts are courts of limited jurisdiction, having subject-matter
 7 jurisdiction only over matters authorized by the Constitution and Congress. *See e.g.*,
 8 U.S. Const. Art. III, § 2, cl. 1; *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
 9 375, 377 (1994). Federal courts have original jurisdiction where an action arises
 10 under federal law, or where each plaintiff’s citizenship is diverse from each
 11 defendant’s citizenship and the amount in controversy exceeds \$75,000. 28 U.S.C.
 12 §§ 1331, 1332(a). Also, a court has subject matter jurisdiction pursuant to Class
 13 Action Fairness Act (“CAFA”) when any civil action in which the matter in
 14 controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs,
 15 and is a class action in which any member of a class of plaintiffs is a citizen of a State
 16 different from any defendant. 28 U.S.C. § 1332(d).

17 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant may
 18 move to dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P.
 19 12(b)(1). “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
 20 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d
 21 1214, 1242 (9th Cir. 2000)). A facial attack is based on the challenger’s assertion that
 22 the allegations in the complaint are “insufficient on their face to invoke federal
 23 jurisdiction.” *Id.* A factual attack disputes the validity of allegations that, if true,
 24 would invoke federal jurisdiction. *Id.* In resolving a facial attack, a court must
 25 consider the allegations of the complaint as true. *Leite v. Crane Co.*, 749 F.3d 1117,
 26 1121 (9th Cir. 2014) (quoting *Safe Air*, 373 F.3d at 1039) (“A ‘facial’ attack accepts
 27 the truth of the plaintiff’s allegations but asserts that they ‘are insufficient on their face
 28 to invoke federal jurisdiction.’”).

Here, the Court determines facially that it has subject matter jurisdiction. Plaintiffs assert that the Court has subject matter jurisdiction under the Magnuson-Moss Warranty Act and CAFA because: (1) this is a class action involving thousands of class members; (2) Plaintiffs are citizens of the States of California, Florida, Nevada, Arizona, Louisiana, Mississippi, New York and Ohio; Defendants are citizen of the States of Texas and California; and on information and belief more than two-thirds of class members reside outside of California; and (3) the amount in controversy is in excess of \$5,000,000, exclusive of interests and costs. (CAC ¶ 9); 15 U.S.C. § 2301; 8 U.S.C. § 1332(d). Moreover, Defendants removed this case from Los Angeles Superior Court under CAFA; accordingly, Defendants do not challenge the Court's jurisdiction under CAFA. (*See* Notice of Removal ¶ 3.) Hence, for purposes of transfer the Court determines that it has subject matter jurisdiction. *See Bookout v. Beck*, 354 F.2d 823, 825 (9th Cir. 1965) ("jurisdiction must be first found over the subject matter and the person before one reaches venue.").

B. SERVICE

1. Adequacy of Service Under 12(b)(4)

Defendants seek dismissal of claims brought against Ashley Black Fasciology, LLC, Ashley Black Guru, ABC, and Ashley Black individually, maintaining that the Plaintiffs failed to serve these entities and Ms. Black. (Mot. to Dismiss Pursuant to 12(b)(4)–(5) ("Mot. II") 1, ECF No. 47.)

Under Federal Rule of Civil Procedure 12(b)(4) a party may seek dismissal of a complaint for insufficient process. The sufficiency of process is governed by Federal Rule of Civil Procedure 4, which requires, among other things, that a summons "name the court and the parties" and "be directed to the defendant." Fed. R. Civ. P. 4(a)(1)(A), (B). The Ninth Circuit has held that "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Thus, "[e]ven if the summons fails to name all of the

1 defendants, . . . dismissal is generally not justified absent a showing of prejudice.” *Id.*
 2 (citations omitted). If service of process is insufficient, the district court has
 3 discretion to dismiss an action or quash service. *S.J. v. Issaquah Sch. Dist. No. 411*,
 4 470 F.3d 1288, 1293 (9th Cir. 2006).

5 Here, Defendants do not contend that the lack of service is prejudicial, arguing
 6 instead that the Court lacks jurisdiction because the Plaintiffs did not serve the
 7 aforementioned individuals and entities within ninety days as required by Federal
 8 Rule of Civil Procedure 4(m). (Mot. II 1–2.) In the absence of prejudice, dismissal is
 9 not warranted. *See Alcatel-Lucent USA, Inc. v. Dugdale Commc’ns, Inc.*, No. CV 09-
 10 2140 PSG (JCx), 2009 WL 3346784, at *3 (C.D. Cal. Oct. 13, 2009) (finding that
 11 dismissal was not warranted in the absence of prejudice). Thus, Defendants’ Motion
 12 to Dismiss under Federal Rule of Civil Procedure 12(b)(4) is **DENIED**.

13 **2. Whether Service was Proper Under 12(b)(5)**

14 Under Federal Rule of Civil Procedure 12(b)(5), a party may seek dismissal of a
 15 complaint for insufficient service of process. Fed. R. Civ. P. 12(b)(5). “Once service
 16 is challenged, [the] plaintiff[] bear[s] the burden of establishing that service was valid
 17 under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). Pursuant to
 18 Rule 4(e)(1), an individual may be served in a judicial district of the United States by
 19 “following state law for serving a summons in an action brought in courts of general
 20 jurisdiction in the state where the district court is located or where service is made.”
 21 Fed. R. Civ. P. 4(e)(1). The California Code of Civil Procedure permits “summons
 22 [to] be served in a manner which is reasonably calculated to give actual notice to the
 23 party to be served.” Cal. Civ. Proc. Code § 413.30.

24 The Ninth Circuit, considering service on foreign defendants, found that service
 25 by email may be reasonably calculated to apprise a defendant without an “office [] or
 26 a door” of the pendency of an action and afford it an opportunity to respond. *Rio*
 27 *Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017–18 (9th Cir. 2002). Other
 28 courts have also approved of service by messages to social media accounts. *Shinde v.*

1 *Nithyananda Found.*, No. EDCV 13-00363-JGB (SPx), 2014 WL 12597121, at * 6–7
 2 (C.D. Cal. Aug. 25, 2014) (service via Facebook). A party utilizing service through
 3 email or social media must usually show that the party to be served “cannot with
 4 reasonable diligence be served in another manner.” *See Kohler v. Domainjet, Inc.*,
 5 No. 11-cv-1767-BEN MDD, 2012 WL 716883, at *2 (S.D. Cal. Mar. 5, 2012) (citing
 6 Cal. Civ. Proc. Code § 415.50(a)(1)). “Reasonable diligence” means that “the
 7 plaintiff ‘took those steps which a reasonable person who truly desired to give notice
 8 would have taken under the circumstances.’” *Torrison v. Thompson*,
 9 No. 2:12-CV-6939-ODW (MRWx), 2013 WL 12205580, at *2 (C.D. Cal. Sept. 16,
 10 2013) (quoting *Donel, Inc. v. Badalian*, 87 Cal. App. 3d 327, 333 (1978)).

11 Here, on December 5, 2017, Plaintiffs attempted to serve Ms. Black personally
 12 at three different locations in Manhattan Beach, California, and Hermosa Beach,
 13 California. (Pls.’ Opp’n to Mot. II (“Opp’n II”) 2–3, ECF No. 81; Decl. of Perrin F.
 14 Disner in Supp. of Opp’n II, (“Disner Decl. II”) ¶¶ 2–3, ECF No. 82.) Plaintiffs
 15 maintain that Ms. Black’s social media accounts indicated her city of residence as
 16 Tamarindo, Costa Rica, fact allegedly publicly offered by Ms. Black. (Opp’n II 2;
 17 Disner Decl. II ¶ 5.) Plaintiffs also indicate that the original lawsuit was publicly
 18 posted online in multiple Fasciablaster-themed Facebook discussion groups within
 19 twenty-four hours of filing, and that Ms. Black made a public statement regarding the
 20 lawsuit that was posted at www.AshleyBlackLawsuits.com. (Disner Decl. II ¶ 7.)

21 The Court finds that service by posting the Complaint on Facebook was
 22 reasonably calculated to provide Black with actual notice of this action. *See Shinde*,
 23 2014 WL 12597121, at * 6–7. Here, Plaintiffs have been unable to locate and serve
 24 Ms. Black personally after repeated attempts to do so. The Court finds this is
 25 sufficient to show that Ms. Black “cannot with reasonable diligence be served”
 26 through non-electronic means. *See Kohler*, 2012 WL 716883, at *2 (finding
 27 reasonable diligence after private investigator could not find valid physical address at
 28 which to effectuate service). Further, Ms. Black’s social media accounts are actively

1 used. *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-cv-3240-LB, 2016 WL
 2 5725002, at *2 (N.D. Cal. Sep. 30, 2016) (allowing service by Twitter when party
 3 “has an active Twitter account and continues to use it to communicate with his
 4 audience”). Here, Ms. Black publicly referenced this lawsuit on the internet to
 5 communicate with her audience and share her view on the lawsuit. (Opp’n II 3–4.)
 6 Under these circumstances, the Court finds that service by social media is the best
 7 method for providing actual notice to Ms. Black, and service was therefore proper.

8 Accordingly, Defendants’ Motion to Dismiss for insufficient service of process
 9 (ECF No. 47) is **DENIED**.

10 **C. PERSONAL JURISDICTION**

11 Defendants move to dismiss for lack of personal jurisdiction under 12(b)(2),
 12 arguing that the Complaint fails to establish general jurisdiction over any Defendant
 13 because they are not “at home” in California. (Mot. to Dismiss Pursuant to 12(b)(2)
 14 (“Mot. I”) 8–9, ECF No. 46.) Defendants also argue that the Court lacks specific
 15 personal jurisdiction due to a lack of minimum contacts by all Defendants generally,
 16 and ADBIH specifically. (Mot. I 9–14.) Finally, Defendants maintain that the Court
 17 lacks specific personal jurisdiction over California claims made by class members
 18 who reside outside California. (Mot. I 13–17.)

19 A party seeking to establish jurisdiction over a person or entity can either:
 20 (1) show each defendant’s sufficient, direct contacts with the forum state, or (2) use
 21 the alter ego theory to “extend personal jurisdiction to a foreign parent or subsidiary
 22 when, in actuality, the foreign entity is not really separate from its domestic affiliate.”
 23 *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015). The party asserting
 24 jurisdiction bears the burden to establish jurisdictional facts. *Pebble Beach Co. v.*
 25 *Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). When the party invoking jurisdiction
 26 does not ask for jurisdictional discovery, courts must evaluate whether the “pleadings
 27 and affidavits establish a prima facie showing of jurisdictional facts.” *Data Disc, Inc.*
 28 *v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1286 (9th Cir. 1977). Accordingly, the party

1 asserting jurisdiction cannot “simply rest on the bare allegations of its complaint”;
 2 however, “uncontroverted allegations in the complaint must be taken as true.”
 3 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

4 “When no federal statute governs personal jurisdiction, the district court applies
 5 the law of the forum state.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir.
 6 2008). “California’s long-arm statute is co-extensive with federal standards, so a
 7 federal court may exercise personal jurisdiction if doing so comports with federal
 8 constitutional due process.” *Id.* “There are two forms of personal jurisdiction that a
 9 forum state may exercise over a nonresident defendant—general jurisdiction and
 10 specific jurisdiction.” *Id.* at 1016. The Court begins with general personal
 11 jurisdiction before addressing specific jurisdiction.

12 **1. General Jurisdiction**

13 A federal court can exercise general personal jurisdiction as to defendants
 14 domiciled within the forum state at the time the action is commenced even if they are
 15 absent from the state. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880
 16 (2011). “Residence” is simply the place where one lives, even temporarily, and
 17 regardless of intent to remain. *Williams v. North Carolina*, 325 U.S. 226, 229 (1945).
 18 On the other hand, “domicile” is the place where one resides with the intent to remain
 19 indefinitely. *Id.* A corporation will be deemed “domiciled” in its state of
 20 incorporation or where it has its principal place of business. *Goodyear Dunlop Tires*
 21 *Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). Only in “exceptional case” will
 22 a corporation be deemed “at home” for purposes of general jurisdiction anywhere
 23 other than place of incorporation and principal place of business. *Daimler AG v.*
 24 *Bauman*, 571 U.S. 117, 139 n.19 (2014); *see Bristol-Myers Squibb Co. v. Superior*
 25 *Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) (California court lacked personal
 26 jurisdiction over claims by non-California residents against pharmaceutical company
 27 despite company’s extensive sales, marketing and research in California).

28 In the Consolidated Amended Complaint, Plaintiffs maintain that the Court has

1 general jurisdiction because Defendant Ashley Black resides in California in this
 2 district;² is the founder and principal owner of Defendant corporate entities; and “is
 3 the person primarily responsible for the alleged wrongdoing.” (CAC ¶¶ 168–69.)
 4 Moreover, Plaintiffs assert that each corporate entity is owned by Ms. Black and does
 5 not possess independent corporate existence. (Pl.’s Opp’n to Mot. I (“Opp’n I”) 2,
 6 ECF No. 77.) Yet, Plaintiffs provide no other factual allegations to establish Ms.
 7 Black’s domicile. (*See generally* CAC.)

8 The Court determines that Plaintiffs have not satisfied the “exacting” standard
 9 necessary to establish general jurisdiction over Ms. Black or any corporate entity, as
 10 they have offered no evidence demonstrating that Ms. Black is domiciled in California
 11 or that any entity is registered or incorporated to do business in the state, has staff in
 12 California, has a registered agent for service of process, or pays state taxes. *See, e.g.,*
 13 *Goodyear*, 564 U.S. at 920–21; *Helicopteros Nacionales de Colombia, S.A. v. Hall*,
 14 466 U.S. 408, 411 (1984).

15 2. Alter Ego

16 Even if the Court found general jurisdiction over Ms. Black, the alter ego theory
 17 does not succeed in conveying that jurisdiction to the corporate Defendants because
 18 Plaintiffs have fails to sufficiently allege alter ego for the reasons that follow.

19 The “alter ego rule” is an exception to the general jurisdiction rule, which “may
 20 be used to extend personal jurisdiction to a foreign parent or subsidiary when, in
 21 actuality, the foreign entity is not really separate from its domestic affiliate.” *Ranza*,
 22 793 F.3d at 1073 (emphasis omitted). To satisfy this test, “a plaintiff must make out a
 23 prima facie case (1) that there is such unity of interest and ownership that the separate
 24 personalities of the two entities no longer exist and (2) that failure to disregard their
 25 separate identities would result in fraud or injustice.” *Id.* (quotation marks and
 26 alterations omitted).

27
 28 ² Plaintiffs note that they alleged Ms. Black resided in California at the time the acts and omissions
 occurred and note that Ms. Black now resides in Costa Rica. (Opp’n II 2.)

1 “The ‘unity of interest and ownership’ prong of this test requires a showing that
2 the parent controls the subsidiary to such a degree as to render the latter the mere
3 instrumentality of the former.” *Id.* (internal quotation marks omitted). “This test
4 envisions *pervasive control* over the subsidiary, such as when a parent corporation
5 dictates every facet of the subsidiary’s business—from broad policy decisions to
6 routine matters of day-to-day operation.” *Id.* (internal quotation marks omitted;
7 emphasis added).

8 Routine interaction and coordination between a parent and its subsidiary is not
9 “pervasive control.” *See, e.g., Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970,
10 983 (N.D. Cal. 2016) (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir.
11 2001)) (discussing that, so long as corporate formalities are observed, “an active
12 parent corporation involved directly in decision-making about its subsidiaries’
13 holdings” is insufficient to overcome presumption of corporate separateness). Indeed,
14 even “[t]otal ownership and shared management personnel are alone insufficient to
15 establish the requisite level of control.” *Ranza*, 793 F.3d at 1073.

16 Here, Plaintiffs contend that Ms. Black dictates every facet of the corporate
17 Defendants’ day-to-day operations, which is allegedly highlighted by Defendants’
18 counsel indicating that other Defendants are referenced as “an Ashley Black
19 Company.” (Opp’n I 3.) Defendants argue that the Court need not accept Plaintiffs’
20 controverted assertions, while ignoring that factual disputes shall be resolved in
21 Plaintiffs’ favor. (Defs.’ Reply to Pls.’ Opp’n to Mot. I (“Reply I”) 3, ECF No. 88.)
22 Even with this benefit, Plaintiffs’ argument fails because it is merely a conclusory
23 allegation buttressed by describing a parent-subsidiary relationship. *See Williams v.*
24 *Yamaha Motor Co.*, 851 F.3d 1015, 1021–22 (9th Cir. 2017) (finding the plaintiff’s
25 conclusory allegations insufficient to establish *prima facie* case that parent and
26 subsidiary were alter egos). Establishing alter egos requires more, and Plaintiffs have
27 failed to establish the pervasive control necessary to establish a unity of interest. *Id.*
28 (noting that a plaintiff must assert factual allegations regarding the nature of the

parent-subsidary relationship that show pervasive control to establish a prima facie case of alter egos). Accordingly, even if the court found general jurisdiction over Ms. Black, Plaintiffs' alter ego theory fails.

3. Specific Jurisdiction

As a threshold matter, the Court must consider the personal jurisdiction of all entities. *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Holland Am. Line Inc. v. Wärtsilä North America, Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) ("where a parent and a subsidiary are separate and distinct corporate entities, the presence of one . . . in a forum state may not be attributed to the other"). Accordingly, the Court must determine whether Plaintiffs have established specific jurisdiction for each Defendant and may not attribute specific jurisdiction from one Defendant to another. *Holland Am. Line*, 485 F.3d at 459.

Also, Plaintiff acknowledge that the Court has only pendant personal jurisdiction over Defendants for the non-California claims of non-California named Plaintiffs. (Opp'n I 5.) Therefore, this Court may only exercise pendent personal jurisdiction over those claims.³ *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015); *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1181 (9th Cir. 2004). However, to exercise pendent personal jurisdiction the court must first have jurisdiction over Defendants for the California-claims that are brought by California named Plaintiffs. *Picot v. Weston*, 780 F.3d at 1211.

Under the Ninth Circuit's three-prong test, a court may exercise specific personal jurisdiction over a non-resident defendant when:

- (1) [t]he non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or

³ Defendants argue that the Court has no basis for asserting pendent personal jurisdiction because Plaintiffs' federal claims do not allow nationwide personal jurisdiction, as required by *Action Embroidery Corp.* (Reply I 8.) However, the Ninth Circuit does not require nationwide personal jurisdiction to assert pendent personal jurisdiction; rather "the district court may exercise pendent personal jurisdiction over any remaining claims that arise out of the same 'common nucleus of operative facts' as the claim for which jurisdiction exists." *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015); *CE Distrib. v. New Sensor Corp.*, 380 F.3d 1107, 1113 (9th Cir. 2004).

1 perform some act by which he purposefully avails himself of the
2 privilege of conducting activities in the forum, thereby invoking the
3 benefits and protections of its laws; (2) the claim must be one which
4 arises out of or relates to the defendant's forum-related activities; and
5 (3) the exercise of jurisdiction must comport with fair play and
6 substantial justice, *i.e.* it must be reasonable.

7 *Schwarzenegger*, 374 F.3d at 802.

8 The plaintiff bears the burden of satisfying the first two prongs of the test. *Sher*
9 *v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). If the plaintiff fails to satisfy either
10 of these prongs, personal jurisdiction is not established in the forum state. *Boschetto*,
11 539 F.3d at 1016. If the plaintiff succeeds in satisfying both of the first two prongs,
12 the burden then shifts to the defendant to "present a compelling case" that the exercise
13 of jurisdiction would not be reasonable. *Id.* (quoting *Burger King Corp. v. Rudzewicz*,
14 471 U.S. 462, 476–78 (1985)).

15 As Plaintiffs allege that Defendants promote the FasciaBlaster online primarily,
16 personal jurisdiction in the internet website context is particularly relevant here. "In
17 the internet context, the Ninth Circuit utilizes a sliding scale analysis under which
18 'passive' websites do not create sufficient contacts to establish purposeful availment,
19 whereas interactive websites may create sufficient contacts, depending on how
20 interactive the website is." *j2 Cloud Servs., Inc. v. Fax87*, No. 13-05353 DDP
21 (AJWx), 2017 WL 1535083, at *6 (C.D. Cal. Apr. 27, 2017). In determining
22 interactivity, the critical inquiry is the "nature and quality," not merely the quantity, of
23 the contacts. *Am. Auto. Ass'n, Inc. v. Darba Enterprises Inc.*, No. C 09–510 SI, 2009
24 WL 1066506, *4 (N.D. Cal. Apr. 21, 2009) (quoting *Cybersell, Inc. v. Cybersell, Inc.*,
25 130 F.3d 414, 418–19 (9th Cir. 1997)).

26 Here, Plaintiffs' argue that Defendants have purposefully availed themselves by
27 "conduct[ing] and transact[ing] business in the State of California, contract[ing] to
28 supply goods within the State of California, and supply[ing] goods within the State of
California." (CAC ¶ 10.) However, Plaintiffs fail to discriminate with any specificity

1 as to which of the named corporate Defendants have purposefully directed its
2 activities at the forum state by way of the alleged websites, leaving the Court to
3 speculate as to which Defendant availed itself. This is insufficient. *Holland Am. Line*,
4 485 F.3d at 459 (a plaintiff must establish specific jurisdiction for each defendant and
5 may not attribute specific jurisdiction from one defendant to another).

6 Without a further showing, Plaintiffs have not demonstrated which, if any,
7 corporate Defendants have purposefully availed themselves, byway of the alleged
8 websites, to the State of California. *Nutrition Distrib. LLC v. Bigdانسfitness, LLC*,
9 No. 17CV00920 JAH-MDD, 2018 WL 1108041, at *3 (S.D. Cal. Feb. 26, 2018)
10 (finding conclusory allegations that defendant's website was sufficiently interactive to
11 create requisite contacts is insufficient to establish purposeful availment).
12 Accordingly, Plaintiffs have failed to plead adequate facts as to each corporate
13 Defendant, necessary to satisfy the first prong. *See Swartz v. KPMG LLP*, 476 F.3d
14 756, 766 (9th Cir. 2007) (finding conclusory allegations that defendants "directed
15 communication into the [forum state] and otherwise conducted business therein"
16 insufficient to make a prima facie showing of personal jurisdiction).

17 By failing to satisfy the first prong, Plaintiffs have failed to establish that this
18 Court has specific personal jurisdiction over Defendants. *See Boschetto*, 539 F.3d at
19 1016. Accordingly, because this Court lacks personal jurisdiction over Defendants, it
20 may not exercise pendent personal jurisdiction over non-California Plaintiffs' claims.
21 *Picot*, 780 F.3d at 1211 (personal jurisdiction must exist over one claim to exercise
22 pendent personal jurisdiction over claims that lack personal jurisdiction).

23 **D. DISMISSAL OR TRANSFER**

24 As the Court lacks personal jurisdiction over Defendants, it must determine
25 whether to dismiss or transfer the action. *See* 28 U.S.C. § 1631. Pursuant to section
26 1631, a court lacking jurisdiction shall transfer the action to a court in which it could
27 have been brought when filed, if transfer is in the interest of justice. *Miller v.*
28 *Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990). "Normally transfer will be in the

1 interest of justice because normally dismissal of an action that could be brought
2 elsewhere is ‘time-consuming and justice-defeating.’” *Id.* Here, all Defendants are
3 domiciled in Houston, Harris County, Texas. (Decl. of John Ketter ¶ 10, ECF
4 No. 49.) Pursuant to 28 U.S.C. §§ 1631 and 1404(a), the Court finds that transfer is
5 appropriate to the Southern District of Texas, Houston Division because all of the
6 Defendants are subject to general personal jurisdiction in the state of Texas.
7 Moreover, dismissal of this action would not serve the interest of justice here because
8 transfer is proper. *Miller*, 905 F.2d at 262.

9 Therefore, the court **DENIES** Defendants’ motion to dismiss pursuant to
10 12(b)(2), and instead **TRANSFERS** the matter to the Southern District of Texas.
11 (ECF No. 46.)

12 IV. CONCLUSION

13 For the reasons discussed above, the Court **STRIKES** Defendants’ motions to
14 dismiss and to strike (ECF Nos. 63–64); **DENIES** Defendants’ motion to dismiss for
15 insufficient process and failure to timely serve (ECF No. 47); and **DENIES**
16 Defendants’ motion to dismiss for lack of personal jurisdiction (ECF No. 46), but
17 instead **TRANSFERS** the matter to the Southern District of Texas. Accordingly, the
18 Clerk of Court shall **TRANSFER** the action to the United States District Court,
19 Southern District of Texas, Houston Division, 515 Rusk Street, Houston, TX 77002.
20 Motions to Dismiss (ECF Nos. 45, 48) are **DENIED** without prejudice in light of the
21 Courts order to transfer.

22
23 **IT IS SO ORDERED.**

24
25 September 25, 2019

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OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE